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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 459

LAURIE J. CARPENTER,

Petitioner,

—v.—

ERIE RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

PAGE

Opinion Below 1

Statute Involved 2

Statement of the Case 2

Argument 3

Conclusion 4

TABLE OF CASES

Carpenter v. Erie R. Co., 132 F. 2d 362, cert. den. 318 U. S. 788 (1943) 3, 4

Laurie J. Carpenter v. Erie Ry., L. 60, P. 20, (S. D. N. Y., Feb. 2, 1935) 4

Reading v. Koons, 271 U. S. 58 (1926) 3

STATUTE

Federal Employers' Liability Act, 45 U. S. C. §56 ..... 2, 3

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Opinion Below

No opinion was delivered by the United States District Court for the Southern District of New York. The opinion of the United States Court of Appeals for the Second Circuit is officially reported in 170 F. (2d) 73 and reads as follows (R. 23):

> "*Per Curiam*: Affirmed on the authority of *Michalek* v. *United States Gypsum Company*, 2 Cir., 76 Fed. (2) 115, and *Moore* v. *Atchison, Topeka and Santa Fe Railroad*, 187 Okla. 534, 104 P. 2d 236."

Statute Involved

Section 56 of the Federal Employers' Liability Act (45 U. S. C. §56), as in effect on June 12, 1928, provided:

> "No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued."

The period of limitations was subsequently extended from two to three years by Act of August 11, 1939, Ch. 685, §2, 52 Stat. 1404.

Statement of the Case

This is an action commenced on April 6, 1948, under the Federal Employers' Liability Act to recover damages for an injury to plaintiff's foot alleged to have been sustained twenty years ago on June 12, 1928 (R. 7-10). Defendant moved for summary judgment upon the ground that the action was barred by the statute of limitations and that the issue of limitations was already *res adjudicata* between the parties (R. 4-6). The motion was granted and the complaint was dismissed (R. 1-2). The Court of Appeals affirmed (R. 23-24).

This is the fourth and latest of a series of actions brought by plaintiff against defendant on this claim in various jurisdictions over the past two decades. In a prior action commenced in the United States District Court for the Southern District of New York on December 27, 1934, the complaint alleged that "Plaintiff is insane * * *" (R. 18, Par. 29).

In the 1934 action, as in the instant case, plaintiff sought damages for an injury to his foot alleged to have been sustained on June 12, 1928 (R. 14, Par. 4 *et seq.*). Defen-

dant moved for judgment dismissing the complaint and since plaintiff was then, as now, unrepresented by Counsel, Judge Caffey appointed counsel to represent him. In his opinion, dated February 2, 1935, Judge Caffey pointed out (R. 19-20) that the Federal Employers' Liability Act was the only possible basis of Federal jurisdiction of plaintiff's claim, and that the action was barred by the two-year statute of limitations then provided in that Act (45 U. S. C. §56). An order dismissing that action was duly made and entered on February 14, 1935 (R. 21-22).

As appears from Judge Caffey's opinion (R. 19) a still earlier action had been brought by plaintiff against defendant in the State Court of New Jersey, which resulted in a non-suit on September 29, 1932.

As appears from the *Per Curiam* opinion in *Carpenter* v. *Erie R. Co.*, 132 F. 2d 362 (C. C. A. 3rd, 1942), cert. den. 318 U. S. 788, still another action was brought by plaintiff in the United States District Court for the District of New Jersey subsequent to Judge Caffey's decision and prior to the institution of the instant action. The dismissal, upon the ground of limitations, of the action brought in District of New Jersey was affirmed by the Court of Appeals for the Third Circuit and plaintiff's petition for certiorari was denied by this Court on April 12, 1943.

ARGUMENT

The decision below was clearly correct.

A cause of action under the Federal Employers' Liability Act accrues on the date of the accident and the period within which suit must be commenced runs from that date. *Reading* v. *Koons*, 271 U. S. 58, 63 (1926).

Since it affirmatively appeared from the face of the complaint that the instant action was not commenced until

some twenty years after the accrual of plaintiff's cause of action, it was required to be dismissed and defendant's motion for summary judgment was properly granted. *Carpenter* v. *Erie R. Co.*, 132 F. (2d) 362, cert. den. 318 U. S. 788.

The fact that plaintiff's claim was barred by the statute of limitations was *res adjudicata* under the earlier holding of the United States District Court for the Southern District of New York in the 1934 action between the parties. *Laurie J. Carpenter* v. *Erie Ry.*, L. 60, P. 20 (R. 19-22).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

DAVIS POLK WARDWELL SUNDERLAND & KIENDL,
Attorneys for Respondent.

EDWARD J. MCGRATTY, JR.,
Of Counsel.

New York, N. Y., January 11, 1949.